IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 352

GENERAL MOTORS CORPORATION, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF THE ELECTRONIC INDUSTRIES ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

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Pursuant to Rule 42 of the Supreme Court of the United States, Electronic Industries Association respectfully moves this Court for leave to file the accompanying brief in support of the petition by General Motors Corporation for a writ of *certiorari* in the instant case. Counsel for petitioner has stated that petitioner consents to the filing of this brief, but counsel for the respondent has refused.

The Electronic Industries Association (hereinafter referred to as EIA) has approximately 325 member

companies. These companies manufacture electronic devices and market them throughout the United States. EIA is national in scope, and represents the fifth largest manufacturing industry in the United States, with gross annual sales exceeding $15 billion.

Some of the larger members of EIA have their own distribution outlets, either as divisions or subsidiaries. However, the majority of the members of the Association are electronic companies whose sales total $25 million or less annually. The smaller members rely on sales to established distributors or dealers, or sales through manufacturers representatives, as their method of distributing their products. Sales to dealers and distributors are solicited by salesmen traveling through many states.

In addition, it is essential that electronic manufacturers provide engineering advice and service to the ultimate users of their products. Without this technical assistance the user would find difficulty in suiting the application of the various devices to his specific needs.

The activities of the salesmen, engineers, servicemen, and manufacturers representatives, being spread over many states, are likely to and do expose Association members to net income taxes in many states, and the District of Columbia. Because of this exposure, fair apportionment of net income for tax purposes is a subject of concern to EIA and its members. If the decision of the majority of the Court of Appeals is permitted to stand, the existing situation in which the District is permitted to tax 100% of the net income of sales to its residents, though a considerable percentage of such income has been earned and taxed

elsewhere, will persist, to the detriment of the commerce of the Association's members with customers in the District. Moreover, if the states are free to adopt as a standard of fairness the rationale of the decision of the Court of Appeals, formulas most destructive of interstate commerce would be sanctioned. For example, the state wherein an association member manufactures devices could adopt a single factor cost-of-manufacture formula, which would meet the Court of Appeal's standard equally as well as the District's single factor destination-of-sales formula; yet the combination of the two would tax 200% of the net income from this commerce.

EIA has an interest in this case by reason of the substantial effect that the decision of the Court of Appeals will have on the business of its members with District customers, and because of the potential effect of the decision on their commerce in other states. Applicant wishes to show the effect on its members of the constitutional issue presented, and to urge this Court to grant a writ of certiorari to clarify this important area of constitutional law.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF ELECTRONIC INDUSTRIES ASSOCIATION

QUESTIONS PRESENTED

Whether, for purposes of the District of Columbia Income and Franchise Tax of 1947, the apportionment of net income from sales by means of a single-factor sales formula which has the effect of allocating all of the net income from sales of goods to the jurisdiction to which the goods are delivered, violates the due process clause of the fifth amendment and the commerce clause of the U.S. Constitution in the case of a foreign corporation which manufactures goods at a point outside the District and ships a portion thereof to vendees in the District.

ARGUMENT

The petition should be granted because of the importance to the national commerce of the question of fair apportionment of taxes paid by businesses engaged in interstate commerce. In *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450 (1959), this Court made it clear that the taxing power of the states reaches the net income from pure interstate commerce, subject only to two constitutionally imposed conditions; namely, (1) that the tax be non-discriminatory and (2) that it be fairly apportioned to activities within the taxing state forming sufficient nexus to support it. Later in the opinion, the Court stated that a fair apportionment assures that a state is exacting only a constitutionally fair demand, and that apportionment prevents the levying of net income taxes that discriminate against interstate commerce and "place it at a disadvantage relative to local commerce" (p. 462). The Court went on to acknowledge that, "apportionment formulas being what they are", (p. 462) this result is not always attained, but pointed out that no question of the fairness of the apportionment had been raised by either taxpayer.[1]

We read the Court's remarks as holding out the reasonable expectation that in later cases in which the point might be properly raised, the Court will consent to review the fairness of apportionment formulas, at least when the question raised deals with the boundaries or outer limits of unfairness.

The present case presents an instance in which the Court should fulfill that expectation. The recent Con-

[1] *Northwestern States Portland Cement Co.* v. *Minnesota; Williams* v. *Stockham Valves and Fittings, Inc.,* 358 U.S. 450 (1959).

gressional report on state taxation of interstate commerce [2] states on pages 552, 553, 556 and 557 that the one factor apportionment formula of the District of Columbia produces the largest departure from the norm of any of the 38 apportionments of net income found at the State level in this country. In this group of 38 jurisdictions, only two others beside the District of Columbia use single factor sales formulas, and in these States (Iowa and Missouri), the degree of unfairness that would otherwise be produced is ameliorated by the permission of separate accounting and by the omission of a significant percentage of sales to in-state destinations from the numerators of both formulas.[3]

The Court of Appeals, in the majority opinion on rehearing, observed (p. 63a of Appendix to Petition for Writ of Certiorari) that the District's one factor sales formula had the effect of apportioning the entire net income of General Motors from all sources, but did not have the effect of apportioning the income from District sales. Stated otherwise, the Court of Appeals found that the formula operated to divide the total income of the taxpayer into two parts, one representing income bearing a degree of connection (in some cases quite tenuous) with business carried on by the taxpayer in the District, and the other representing income unconnected with the District. The Court acknowledged that the portion representing

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[2] "State Taxation of Interstate Commerce," Report of the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary of the House of Representatives, pursuant to P.L. 86-272, as amended, House Rep. No. 1480, 88th Cong., 2d Sess. (June 15, 1964).

[3] *Id.*, pp. A280, A281, and A308.

income related in some degree to the District was not further apportioned between the District and the other States in which occurred activities forming sufficient nexus to support a similar tax; *e.g.*, activities such as the manufacturing operations which produced the automobiles sold to District customers. The Court then held that the statute permitted the use of an apportionment of this type; *i.e.*, one which would allow the District to tax the whole of any portion of the income with which it had any degree of connection, however slight, and without regard to the fact that such portion was subject to an overlapping tax in other nondomiciliary states because of a degree of connection therewith.

The Court of Appeals then went on to hold in Sections IV and V of the opinion (pp. 66a-75a of the Petition for Writ of Certiorari) that this type of apportionment is not constitutionally invalid. In arriving at that conclusion, it stated or implied that the one factor sales formula was "a reasonable choice among alternative methods",[4] that it was not "operating indefensibly",[5] that it "reasonably" attributed income to the District.[6]

The question presented by this holding is therefore of great significance not only to the members of the Electronic Industries Association but to all multi-state taxpayers. Such an apportionment results in a relinquishment of a claim for a tax on income which is wholly unconnected with the jurisdiction, and claims tax on 100% of the income earned partially within and

[4] p. 70a, Petition for Writ of Certiorari.

[5] p. 71a, Petition for Writ of Certiorari.

[6] p. 73a, Petition for Writ of Certiorari.

partially without the jurisdiction, through interstate transactions taxable both there and in other States. If such an apportionment can be considered *constitutionally* fair and defensible, then interstate commerce is helpless to contest competing State revenue demands which result in actual double taxation and actual discrimination. We do not believe the apportionment upheld in this case can be described as fair under any meaning of that term.

CONCLUSION

We urge the Court to grant a writ of *certiorari* herein to resolve the substantial questions presented by the taxpayer's petition.

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